Supreme Court, U.S.
FILED
APR 3 1995
CLERK

No. 94-1304

In the Supreme Court of the United States

OCTOBER TERM, 1994

WEST VIRGINIA STATE DEPARTMENT OF TAX AND REVENUE, PETITIONER

v.

INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

GARY D. GRAY
KENNETH W. ROSENBERG
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTION PRESENTED

Whether a debt for a West Virginia property tax is "incurred," within the meaning of 11 U.S.C. 503(b)(1)(B), on the date that the liability arises or on the subsequent date that the tax is assessed.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B11) is reported at 37 F.3d 982. The opinion of the district court (Pet. App. C1-C11) is not yet reported. The opinion of the bankruptcy court (Pet. App. D1-D8) is reported at 146 B.R. 114.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 1994. A timely petition for rehearing was denied on October 28, 1994 (Pet. App. A1). The petition for a writ of certiorari was filed on January 25, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1990, Columbia Gas Transmission Corporation owned various pipelines in the State of West Virginia. On or before May 1, 1991, Columbia Gas filed a tax return reporting the value of its pipelines for purposes of the State's public service business property tax for the 1990 tax year (Pet. App. E1).

In July 1991, Columbia Gas filed a petition for relief under Chapter 11 of the Bankruptcy Code (Pet. App. B4). In October 1991, the West Virginia State Board of Public Works notified Columbia Gas of the assessed values of its pipelines in that State for the 1990 tax year (Pet. App. E2). The property tax was thereafter assessed by the State under W. Va. Code § 11-6-16 (Michie 1991).

In February 1992, Columbia Gas filed a motion in its bankruptcy case, seeking an order authorizing payment of the West Virginia property tax as a first priority administrative expense under Sections 503(b)(1)(B) and 507(a)(1) of the Bankruptcy Code. Under Section 507(a)(1) of the Code, "administrative expenses allowed under section 503(b) of this title" are granted first priority. 11 U.S.C. 507(a)(1). In turn, Section 503(b)(1)(B) provides that a tax "incurred by the estate" is an administrative expense unless that tax is separately entitled to seventh priority under the provisions of Section 507(a)(7). See 11 U.S.C. 503(b)(1)(B).[1] The United States, which

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[1] The Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 304(c), 108 Stat. 4132, gave seventh priority to a new category of claims and demoted former seventh priority tax claims to eighth priority. These amendments do not affect this case.

had filed claims in the bankruptcy case, opposed the debtor's motion (Pet. App. E1).[2]

2. The bankruptcy court denied the debtor's motion to treat the property tax as an administrative expense. The court rejected the argument that the obligation to pay the taxes arose only when the taxes were assessed. The court held instead that the tax obligation arose in 1990, before the bankruptcy case commenced, when the debtor owned and operated property in West Virginia. The court held that, because the tax liability was "incurred" within the meaning of Section 503(b)(1)(B) of the Bankruptcy Code by the debtor *before* the bankruptcy case was commenced, the taxes did not represent an administrative expense (Pet. App. D8). The district court affirmed (Pet. App. C1-C11).

3. The court of appeals affirmed (Pet. App. B1-B11). The court noted that a tax must be "incurred" by the estate itself to receive administrative priority (*id.* at B6). Because the Bankruptcy Code does not specify when a state tax is "incurred" for this purpose, the court looked to state law in making this determination (*id.* at B7). The court held that, under the law of West Virginia, a property tax is "incurred" on the date that the property becomes subject to the State's tax (*id.* at B7-B10). In this case, that date was December 31, 1990. After that date, under state law, the debtor's liability for the property tax would not have been altered in any

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[2] In July 1992, the State notified Columbia Gas that the 1990 property taxes levied with respect to its pipelines totaled $6,700,429.33 (Pet. App. E3). One-half of that amount was payable by September 1, 1992; the remainder was payable by March 1, 1993 (Pet. App. E2-E3; see W. Va. Code § 11-6-18 (Michie 1991)).

manner if the pipelines subsequently had been sold or destroyed (*id.* at B10-B11). Because the debtor filed for bankruptcy relief after the date that the property tax liability was thus "incurred," the court held that the tax was not an administrative expense of the estate (*id.* at B11).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Expenses incurred in administering a bankruptcy estate receive first priority in distributions from the estate. 11 U.S.C. 507(a)(1). Section 503(b)(1)(B) of the Bankruptcy Code generally provides that a tax "incurred by the estate" represents an administrative expense. 11 U.S.C. 503(b)(1)(B). The date on which a tax is "incurred" for this purpose is to be determined under the law of the taxing jurisdiction. See *Arkansas Corporation Commission* v. *Thompson*, 313 U.S. 132, 142 (1941) ("whether or not taxes are 'legally due and owing' to a state depends upon the valid laws of that state").

The court of appeals correctly held that, under West Virginia law, the property tax involved in this case was incurred on December 31, 1990 (Pet. App. B10). That is the date that the debtor's liability for the property tax became fixed. After that date, the debtor's liability for the tax would not have been diminished or in any manner affected if the pipelines subsequently had been sold or destroyed. See *Moore* v. *Johnson Service Co.*, 219 S.E.2d 315, 319 (W. Va. 1975); *George F. Hazelwood Co.* v. *Pitsenbarger*, 141 S.E.2d 314 (W. Va. 1965), appeal dismissed,

382 U.S. 201 (1965); *Cole* v. *State*, 80 S.E. 487 (W. Va. 1913). The property tax liability was therefore "incurred" by Columbia Gas before it filed for bankruptcy relief. Because the property tax was not "incurred" by the estate, it does not qualify as an administrative expense of the estate under Section 503 of the Bankruptcy Code. 11 U.S.C. 503 (b)(1)(B).

The decision of the court of appeals is a direct application of the established principle that a tax is "incurred" when the liability for the tax arises, rather than when it is administratively assessed. For example, this Court's decision in *Otte* v. *United States*, 419 U.S. 43 (1974), involved Section 64a of the Bankruptcy Act of 1898 (the predecessor of Section 503(b) of the Bankruptcy Code), which provided first priority to "the costs and expenses of administration." 11 U.S.C. 104(a)(1) (1976). The Court held in *Otte* that withholding taxes payable after the petition was filed, but with respect to wages paid for services rendered before bankruptcy, were not expenses of administration because the taxes "derive from and are carved out of" the wage claims to which they related. 419 U.S. at 57. See also *In re Connecticut Motor Lines, Inc.*, 336 F.2d 96, 106 (3d Cir. 1964) (denying administrative expense priority to taxes on wages paid for services rendered prior to bankruptcy); *In re Prime Motor Inns, Inc.*, 144 B.R. 554, 555 (Bankr. S.D. Fla. 1992) ("a tax accrues on the date it is incurred, not on the date of assessment or the date it is payable"); *In re Northeastern Ohio General Hospital Ass'n*, 126 B.R. 513, 515 (Bankr. N.D. Ohio 1991) (a tax is not an administrative expense when the "[e]vents upon which the tax is based occurred entirely pre-petition"); *In*

re Wheeling-Pittsburgh Steel Corp., 103 B.R. 672, 693 (W.D. Pa. 1989) (administrative expense status denied "since the transaction or events upon which these taxes are based occurred prepetition"); *In re Bondi's Valu-King, Inc.*, 102 B.R. 108, 110 (Bankr. N.D. Ohio 1989) ("[a] tax is incurred on the date it accrues, not on the date of assessment or the date on which it is payable"), aff'd on other grounds, 126 B.R. 47 (N.D. Ohio 1991); *In re O.P.M. Leasing Services, Inc.*, 68 B.R. 979, 983-985 (Bankr. S.D.N.Y. 1987); *In re Overly-Hautz Co.*, 57 B.R. 932, 937 (Bankr. N.D. Ohio 1986), aff'd on other grounds, 81 B.R. 434 (N.D. Ohio 1987); *In re Davidson Lumber Co.*, 47 B.R. 597 (Bankr. S.D. Fla. 1985); *In re Higgins*, 29 B.R. 196, 201 (Bankr. N.D. Iowa 1983); *In re Melino Cigar & Candy Co.*, 7 C.B.C.2d 71, 73 (Bankr. R.I. 1982).

2. a. Petitioner suggests (Pet. 7-8) that the statutory term "incurred" should be given a meaning with respect to property taxes that differs from its accepted meaning with respect to all other taxes. Although petitioner concedes that other taxes may be "incurred" without being "assessed," petitioner argues (Pet. 7) that the terms "incurred" and "assessed" should be treated as synonymous for property tax purposes.

Congress did not provide that the term "incurred" means "assessed" in one tax context but not in another. When Congress chose to make the priority of a tax turn on the "assessment" date of a tax, rather than on the date it was "incurred," Congress did so expressly. In providing seventh (now eighth) priority for certain types of pre-bankruptcy property taxes, Congress specified that this lower priority would apply to taxes "assessed before the commence-

ment of the case" (11 U.S.C. 507(a)(7)(B)).[3] The suggestion that Congress used the terms "incurred" and "assessed" indiscriminately in referring to property taxes is inconsistent with the plain language of these statutes.

b. Petitioner contends that property taxes should be distinguished from other types of taxes because property taxes are "not based on a discrete event" (Pet. 8) associated with a particular date. Property tax liability, however, is directly attributable to the "event" of ownership of property at the end of a particular year. That is an even more "discrete event" than the "event" of earning income through divers transactions occurring over the course of an entire year.

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[3] Petitioner argues that the use of the term "incurred" in Section 503(b)(1)(B) and "assessed" in Section 507(a)(7)(B) produces a significant anomaly—some property tax claims, such as the claim at issue in this case, will not enjoy either first or seventh priority even though a claim for an older liability may receive seventh priority and a claim for a post-bankruptcy liability may receive first priority (Pet. 6-7). That result, however, is in large part a product of state law, not the Bankruptcy Code. The effect of a delayed assessment is mitigated in some States by statutes providing that a lien arises as of the end of the year when liability is incurred, although the tax is not determined or assessed until a later time. See, *e.g.*, Ohio Rev. Code Ann. § 5727.06(C) (Anderson 1993); N.C. Gen. Stat. § 105-355 (Michie 1994). Even under the present law of West Virginia, the anomaly that petitioner invokes has been largely ameliorated by the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 401, 108 Stat. 4141, which amends the automatic stay to permit the attachment and perfection of property tax liens after the commencement of the bankruptcy case.

3. The decision in this case is consistent with other appellate decisions. In *Midland Central Appraisal District* v. *Midland Industrial Service Corp.*, 35 F.3d 164 (1994), cert. denied, No. 94-1235 (Mar. 20, 1995), the Fifth Circuit held that a Texas *ad valorem* personal property tax is "incurred" for purposes of Section 503(b)(1)(B) on the date that ownership is determined, for that is "the event that triggers liability." 35 F.3d at 167. Similarly, in *Burns* v. *City of Winston-Salem*, 991 F.2d 116 (1993), the Fourth Circuit held that a North Carolina personal property tax was "incurred" on the date that ownership of the property was determined for purposes of the tax. The court stated that, "[a]lthough the precise amount of the claim was contingent on the tax rate set [on a later date], the contingency would not have affected the tax claim's status as a right to payment." *Id.* at 119 (internal quotation marks omitted).

Petitioner errs in contending (Pet. 11) that the Fourth Circuit's unreported decision in *Forsyth County* v. *Burns*, No. 88-1359 (1989), conflicts with these decisions. In *Burns* v. *City of Winston-Salem*, *supra*, the Fourth Circuit noted that its unpublished decision in *Forsyth County* had no precedential value under that Circuit's Rules. 991 F.2d at 119 n.2. There is thus no conflict among the circuits on the question presented in this case.[4]

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[4] Petitioner asserts that *Makoroff* v. *City of Lockport*, 916 F.2d 890 (1990), cert. denied, 499 U.S. 983 (1991), conflicts with the Third Circuit's decision in the present case. Even if that assertion of an intra-circuit conflict were correct, it would not be an adequate basis for further review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

Petitioner correctly notes (Pet. 11) that the decisions in *Midland Central Appraisal District* v. *Midland Industrial Service Corp.* and *Burns* v. *City of Winston-Salem* involved state taxing schemes under which liens attached on the date that ownership was determined and liability fixed. By contrast, under West Virginia law, the State's lien does not attach until one year after that date. W. Va. Code § 11-6-23 (Michie 1991). That distinction, however, is not material. Administrative expense status under Section 503(b)(1)(B) turns on the date that liability for the tax is "incurred." It does not depend on the date that the taxing authority obtains a lien in the taxpayer's property.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

GARY D. GRAY
KENNETH W. ROSENBERG
Attorneys

APRIL 1995

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